UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

CENTENNIAL PUERTO RICO LICENSE CORPORATION, Plaintiff, v. TELECOMMUNICATIONS REGULATORY BOARD OF PUERTO RICO, et al., Defendants.	Civil No. 08-2436 (JAF) Consolidated with: Civil No. 09-1002 (JAF)

OPINION AND ORDER

This case consolidates two, one filed by Centennial Puerto Rico License Corporation ("Centennial") and one by Puerto Rico Telephone Company, Inc. ("PRTC") (Civil No. 09-1002). (See Docket No. 18.[1]) Each seeks judicial review of certain determinations made by a Commonwealth agency, the Telecommunications Regulatory Board of Puerto Rico, and its members, in their professional capacities, Miguel Reyes-Dávila, Vicente Aguirre-Iturrino, and Nixyvette Santini-Hernández (collectively, "the Board"), alleging violations of, inter alia, the federal Telecommunications Act of 1996 ("TCA"), 47 U.S.C. §§ 251-261; applicable rules and rulings of the Federal Communications Commission ("FCC"); and the Puerto Rico Telecommunications Act of 1996 ("Law 213"), 27 L.P.R.A. §§ 267-272 (2009). (Docket No. 1; Civil No. 09-1002 Docket No. 1.)

[1] Unless otherwise noted, docket citations refer to Civil No. 08-2436.

PRTC, the Board, and Centennial, separately, move for summary judgment. (Docket Nos. 25; 27; 30.) All agree that summary judgment is proper, but they differ on matters of law. (See Docket No. 22.)

I.

Jurisdiction

Pursuant to 28 U.S.C. § 1331, this court has jurisdiction over the parties' federal law claims. See Verizon Md. Inc. v. Pub. Serv. Comm'n, 535 U.S. 635, 643-44 (2002). Pursuant to 28 U.S.C. § 1367, this court also has jurisdiction over the parties' related Puerto Rico law claims.[2]

II.

Factual and Procedural History

PRTC and Centennial are telecommunications carriers in Puerto Rico. (See Joint Ex. 39 at 1-2.[3]) Both provide local telecommunications services within Puerto Rico, which renders them local exchange carriers ("LECs") under the TCA. (Id.) The Board is

[2] Section 269d of Law 213 mirrors the language of the TCA in reserving to this court review of the Board's determinations made under Law 213. See 47 U.S.C. § 252; 27 L.P.R.A. § 269d(e)(5). We question the validity of this jurisdictional allocation, as it appears to impose on this court a duty to adjudicate claims arising under Commonwealth law, in contravention of federal law. See U.S. Const. art. III, § 2; see also, e.g., Burford v. Sun Oil Co., 319 U.S. 315, 317 (1943) (noting that state legislature may not expand jurisdiction of federal district court). We, nevertheless, review the parties' Puerto Rico law claims because, having supplemental jurisdiction under 28 U.S.C. § 1367, we assume the position of a Commonwealth court with plenary power to adjudicate claims arising under an otherwise valid Commonwealth statute.

[3] The parties submitted joint exhibits via compact disc under seal. (See Docket No. 24.)

a Commonwealth agency charged with implementing federal and Puerto Rico telecommunications law. (Id.)

In 2005, PRTC and Centennial completed two interconnection agreements ("2005 Agreements") that governed connections between the two companies for the provision of land-line and wireless telecommunications services within Puerto Rico. (See, e.g., Docket No. 1 at 1-2.) In 2008, they renegotiated their agreements ("2008 Agreements"), and the terms of the 2008 Agreements are the subject of the instant dispute. (See id.)

During said renegotiation, PRTC and Centennial reached an impasse on various issues, which they then submitted to the Board for arbitration, in accordance with 47 U.S.C. § 253(b) and 27 L.P.R.A. § 269d. (See id. at 4.) Concluding the arbitration, the Board resolved all outstanding issues in an order dated August 8, 2008 ("Order") (Joint Ex. 39). PRTC and Centennial each moved the Board to reconsider portions of its Order; the Board obliged and, on November 25, 2008, rendered a decision retaining in part and reversing in part its earlier decision ("Order on Reconsideration") (Joint Ex. 49). On January 7, 2009, Centennial and PRTC each filed suit in this court seeking review of certain issues, described infra Part IV.B, that the Board decided in its Order and Order on Reconsideration. (See Docket No. 1; Civil No. 09-1002 Docket No. 1.)

PRTC, the Board, and Centennial, separately, now move for summary judgment. (Docket Nos. 25; 27; 30.) While all agree that

summary judgment is proper in this case (Docket No. 22), the Board opposes the legal conclusions drawn in PRTC's and Centennial's motions (Docket No. 36); Centennial opposes the legal conclusions drawn in PRTC's and the Board's motions (Docket No. 37); and PRTC opposes the legal conclusions drawn in the Board's motion (Docket No. 39) and in Centennial's motion (Docket No. 40). Further, PRTC replies to Centennial's and the Board's oppositions to its motion (Docket No. 53); Centennial replies to PRTC's opposition to its motion (Docket No. 54); and the Board responds to said replies (Docket No. 63).

III.

Summary Judgment Under Rule 56(c)

We grant a motion for summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In this case, the parties stipulate that there is no genuine issue of material fact requiring a trial. (Docket No. 22 at 2.) Thus, the sole question for our consideration is which party is entitled to judgment as a matter of law.

IV.

Analysis

A. Standard of Review

We review de novo a state agency determination based on federal law. Global NAPs, Inc. v. Verizon New Eng., Inc., 396 F.3d 16, 23 (1st Cir. 2005); see also id. at 23 n.7 (declining to apply deferential review to state agency's determination under the TCA). Where the state agency determination is based on state law, we review same with due deference to the agency's superior knowledge of its governing statute. See WorldNet Telecomms., Inc. v. P.R. Tel. Co., 497 F.3d 1, 11 (1st Cir. 2007) ("Although the Board's authority under local law is a legal issue, it is customary where any doubt exists to give some deference to the agency charged with administering the statute.").

Where no error of law is alleged, we review a state agency's determination under the arbitrary and capricious standard. See Global NAPs, 396 F.3d at 23 n.7. An agency's determination is deemed arbitrary and capricious where the agency fails to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

B. Disputed Issues

PRTC disputes two decisions the Board made in its Order or Order on Reconsideration, while Centennial disputes three others. We consider each in turn.

1. Erroneous-Billing Fee

This issue concerns whether the Board erred in accepting Centennial's proposal that the 2008 Agreements either include an erroneous-billing fee or eliminate a late-payment fee. We derive the following summary from the parties' submissions on this issue. (See Docket Nos. 26 at 6-21; 28 at 9-10, 22-23; 36 at 4-11; 37 at 6-11; 39 at 5-10; 53 at 4-14; 63 at 1-7; Joint Exs. 39 at 6-9; 49 at 9-10; Civil No. 09-1002 Docket No. 1 at 6-7, 17-18.)

In their 2005 Agreements, PRTC and Centennial agreed to late-payment fees on bills due one another as follows: Where the billing party demanded payment and the billed party disputed the charge, the billed party would hold payment in escrow until the resolution of the dispute. If the billing party were ultimately found entitled to the disputed payment, it would receive the payment and any interest accrued thereon while in escrow, plus a 15 percent late-payment fee.

During renegotiation, Centennial proposed elimination of the late-payment fee, arguing that it was unnecessary to compensate the billing party for the funds it was owed. According to Centennial, the billing party was so compensated by receiving the interest earned while in escrow. The late-payment fee, then, was a penalty available

to the billing party when wronged by a billing dispute. But Centennial argued that no such penalty was available to a billed party wronged by a billing dispute, when it was erroneously billed and wrongfully required to hold funds in escrow. At the very least, Centennial argued, fairness required the Board to remedy this one-sided access to penalties. Thus, Centennial proposed that if the Board opted to retain the late-payment fee, it should also adopt an erroneous-billing fee. This would also, according to Centennial, encourage the billing party to avoid erroneous billing, which it had no incentive to do under the standing scheme.

In its Order, the Board rejected Centennial's proposals. It determined that, while penalties were currently only available to the billing party, such asymmetry was justified. Unlike the billing party, the billed party never rendered services for which it was wrongfully forced to await payment. In its Order on Reconsideration, however, the Board reversed its decision, finding that distinction misleading. It adopted Centennial's reasoning and found itself obliged to either create equal access to penalties or eliminate them altogether. Thus, the Board's Order on Reconsideration requires PRTC and Centennial to choose between those two options.

PRTC seeks review of the Board's decision, arguing that it contravenes federal and Puerto Rico law.[4] (Docket No. 26 at 8-18.)

[4] In support of its interpretation of Puerto Rico law, PRTC essentially makes the same arguments that it made, unsuccessfully, in a

Specifically, PRTC contends that the Board acted ultra vires by imposing a penalty payable from one carrier to another via arbitration of an interconnection agreement.[5] (Id.) According to PRTC, substantive Puerto Rico law prohibits the Board from adopting such provisions, and federal law does not allow the Board to contravene state law.[6] (See id. at 9-10.)

The First Circuit foreclosed PRTC's argument, however, holding that "neither federal nor Puerto Rico law forbids [the imposition of] incentive-based liquidated damages" by the arbitrator of an

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recent case in this court. See WorldNet Telecomms., Inc. v. Telecomms. Regulatory Bd., Nos. 08-1360, 08-1359, 2009 WL 2778058, at *5-9 (D.P.R. Aug. 25, 2009). The Board argues that PRTC is, thus, collaterally estopped from making them again now. (Docket No. 63 at 3-5.) We decline to reject PRTC's arguments on that ground, however, because the Board was obliged to raise collateral estoppel as an affirmative defense in its answer, which it failed to do (Docket No. 20 at 7-8). See Fed. R. Civ. P. 8(c).

[5] Centennial takes issue with PRTC's characterization of the Board's action as an "imposition" because the Board gave the carriers the option of either adopting the erroneous-billing fee, to counterbalance the already operative late-payment fee, or eliminating both fees altogether. (Docket No. 37 at 9-10.) PRTC argues that this is properly understood as an imposition because PRTC is faced with the choice of either adopting the, in its view, unlawful penalty provision or giving up the late-payment fee to which it believes itself legally entitled. As PRTC's argument fails even if we consider this an imposition, we find the distinction irrelevant and need not resolve this dispute.

[6] The Board argues that PRTC never raised this argument during the administrative proceedings and, thus, is precluded from doing so here. (Docket No. 36 at 5-7.) As support for this proposition, the Board cites authority regarding the scope of statutorily-prescribed judicial review of federal administrative agency decisions and the scope of appellate review of district court opinions. Such authority is irrelevant to the scope of our review, as ours is de novo regarding a Commonwealth agency decision. See Global NAPs, 396 F.3d at 23 n.7 (declining to review state agency decision deferentially and noting that "the FCC, and not the individual state commissions, is the agency with the power granted by Congress to administer the TCA"); see also supra Part I.

interconnection agreement. WorldNet, 497 F.3d at 8. PRTC acknowledges that decision but argues that the First Circuit so held without regard to a Puerto Rico Court of Appeals case ("Pan American"[7]) denying the Board authority to "adopt penalty provisions that would call for the payment of damages from one carrier to another." (Docket No. 53 at 7, 8 n.3; see Docket No. 53-2 (English-language translation of Pan American).)

In making this argument, PRTC conflates two separate functions of the Board. In Pan American, the court considered whether the Board could establish regulations that would impose a penalty payable from one carrier to another, finding that the Board had no such authority. (Docket No. 53-2 at 17-18.) That is irrelevant to the question of whether the Board can arbitrate and approve penalty provisions in an agreement between two carriers. Thus, Pan American does not upset the First Circuit's determination that neither federal nor Puerto Rico law prohibits the Board's decision on this issue.

PRTC next argues that the Board's decision was arbitrary and capricious because (1) it was contrary to evidence on the record showing that the asymmetrical status of parties to a billing dispute justified a late-payment fee but not an erroneous-billing fee; and (2) the Board, without required explanation, switched its position on

[7] The Spanish-language version of this case is published at Pan Am. Tel. Co. v. Junta Reglamentadora de Telecomms., 2004 T.C.A. 1268 (P.R. Cir. 2004).

reconsideration based on fact findings that were inconsistent with its original order. (Docket No. 26 at 18-19.)

PRTC showed during proceedings before the Board that the late-payment fee was justified because the parties were in different financial positions during the billing dispute: The billing party had rendered services for which payment was wrongfully withheld, while the billed party simply had to tender funds it owed. PRTC further argued that no such asymmetry justified an erroneous-billing fee, as the billed party never rendered services for which it awaited payment. Centennial refuted the latter argument, pointing out a different asymmetry that existed when the billed party put funds to which it was lawfully entitled into escrow while the billing party lost nothing. This other asymmetry is what Centennial proposed to remedy by imposing an erroneous-billing fee, provided the Board rejected Centennial's original proposal of eliminating penalties altogether.

Centennial's logic prevailed before the Board upon reconsideration. The Board's reversal of its earlier decision is not inconsistent with PRTC's showing that the parties' asymmetrical position justified the late-payment fee. It merely makes a necessary and logical distinction between that showing and the different asymmetry illuminated by Centennial. The Board's final decision on this point is reasonable and adequately explained in its Order on

Reconsideration. We reject PRTC's contention that it was arbitrary and capricious.

2. Requirement Regarding Direct Connection

This issue concerns whether the Board erred in accepting Centennial's proposal to require Claro, PRTC's subsidiary and wireless provider, to make all "commercially reasonable efforts" to connect directly to Centennial when providing wireless services. We derive the following summary from the parties' submissions on this issue. (See Docket Nos. 26 at 21-34; 28 at 18-20, 29-32; 36 at 18-21; 37 at 11-14; 39 at 10-13; 53 at 14-17; Joint Exs. 39 at 30-33; 49 at 10-14; Civil No. 09-1002 Docket No. 1 at 4-17.)

Centennial connects with Claro, PRTC's wireless subsidiary, to provide wireless service to its customers. Under the TCA, this Centennial-to-Claro interconnection is required, but they are not required to connect directly. That is, they are required to make at least an indirect connection, which is done by connecting through PRTC. When Centennial makes this indirect connection, PRTC charges Centennial a fee; were Centennial able to connect directly to Claro, no such fee would apply.

Centennial's proposal before the Board was to have PRTC make all "commercially reasonable efforts" to connect directly before PRTC could charge indirect-connection fees. While Centennial acknowledged that direct connection is not required by federal law, it argued that this "efforts" requirement is not preempted by federal law.

Moreover, it argued, direct connection is faster and more efficient and, therefore, better for the public. The Board agreed and decided in its Order, in terms retained on reconsideration, to require PRTC to make all "commercially reasonable efforts" to directly connect before it could be entitled to indirect-connection fees.

PRTC argues that the Board's decision on this matter is inconsistent with, and preempted by, federal law, which specifies that direct connection is not required. (See, e.g., Docket No. 26 at 21-33.) PRTC relies on FCC precedent holding that the TCA does not require direct connection and declining to impose general interconnection obligations on wireless carriers, in favor of "voluntary private agreements." (Docket No. 26 at 21-22 (discussing In re Interconnection & Resale Obligations Pertaining to Commercial Mobile Radio Servs. (CMRS Decision), 15 F.C.C.R. 13523, 13528, 13533-34 (2000)).) In reaching that holding, the FCC reasoned that, at the time of its decision, wireless providers typically lacked the dominant market power that justifies regulatory intervention. See CMRS Decision, 15 F.C.C.R. at 13533-34. PRTC also argues that the FCC has expressly preempted local regulation of wireless interconnection and that "coercion from state regulators" frustrates the FCC's "voluntary private agreements" scheme. (Docket No. 26 at 31-33.)

But PRTC's arguments turn on mischaracterizations of the Board's decision. First, the Board fell short of imposing a direct-connection

requirement, as PRTC suffers no penalty for failure to do so. Second, the Board's arbitration of an inter-carrier agreement does not amount to regulation. Furthermore, we find the Board's decision consistent with FCC precedent on this matter. See, e.g., In re Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Servs., 10 F.C.C.R. 10666, 10687-88 (1995) (acknowledging risk that "LEC-affiliated [wireless] carriers," like Claro, might unreasonably deny efficient connection and suggesting that said denial would justify regulatory intervention). Thus, we reject PRTC's contention that the Board's decision on this issue contravenes federal law.

PRTC also argues that the Board's determination was arbitrary and capricious in that, having made a decision preempted by federal law, the Board relied on factors Congress did not intend the Board to consider. (Docket No. 26 at 33-34.) This argument fails given our rejection of PRTC's preemption argument.

3. Application of Reciprocal Compensation to Certain Calls

This issue concerns whether the Board erred in rejecting Centennial's proposal to apply a particular reciprocal-compensation scheme to certain calls exchanged between Centennial and PRTC. We derive the following summary from the parties' submissions on this issue. (See Docket Nos. 1 at 18-19; 28 at 12-13, 25-27; 32 at 7-13; 36 at 14-16; 37 at 14-16; 40 at 6-17; 54 at 2-9; 63 at 7-10; Joint Exs. 39 at 21-25; 49 at 1-5.)

In 2005, PRTC and Centennial completed an interconnection agreement that included terms on reciprocal compensation. Reciprocal compensation, required by federal law, is intercarrier compensation for the completion of calls that are local – completed within a geographically defined area – and that pass from an originating LEC to a different, terminating LEC ("A-B calls"). See 47 U.S.C. §§ 251(b)(5), 252(d)(2)(A)(i). One issue PRTC and Centennial had to resolve in 2005 was whose call-zone scheme would govern when they completed A-B calls; Centennial maintained one, island-wide call zone, while PRTC had ten. Thus, under Centennial's scheme, all calls completed intraisland would be local, whereas under PRTC's, any call crossing over PRTC zone lines would be long distance. The Board resolved this question in favor of Centennial's scheme, determining that when Centennial and PRTC completed A-B calls, Centennial's call-zone scheme would govern such that all intra-island calls would be considered local.

A new type of call is now at issue. In this case, both the calling and the called parties have PRTC as their local carrier; normally when they call each other, then, they pay long-distance fees if they live in different PRTC call zones. But in this case, the calling party has a long-distance plan through Centennial. As between the carriers, this means that the call originates with PRTC, is handed off to Centennial to transmit, then Centennial passes it back to PRTC to terminate ("A-B-A call"). Currently, when Centennial

passes the call back to PRTC, it pays an access charge, which is paid by any long-distance carrier terminating a call with an LEC. Centennial, in turn, charges that calling customer long-distance rates.

Centennial's argument before the Board, and before this court, is that the reciprocal-compensation arrangement formulated under the 2005 Agreements should apply to these A-B-A calls. It argues that, given the intra-island character of the call, and the fact that Centennial and PRTC interconnect to complete it, the earlier decision setting Centennial's as the governing call zone applies. This would eliminate Centennial's obligation to pay the access charge to PRTC, though Centennial would continue to charge its customer long-distance rates for that particular call.

The Board rejected Centennial's proposal, deciding, in effect, to apply the formulated reciprocal-compensation scheme to only A-B calls. In defending that rejection, the Board points to language in federal law that contemplates only A-B calls, which the Board dubs "local" calls, in establishing requirements for reciprocal compensation. See, e.g., 47 U.S.C. § 252(d)(2)(A)(i) ("[Reciprocal compensation arrangements must] provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier . . . ."). Further, the Board points to FCC rulings that limit reciprocal

compensation to local calls to support its decision that reciprocal compensation should not apply to calls falling outside its definition of local calls. See, e.g., In re Implementation of Local Competition Provisions in TCA (Local Competition Order), 11 F.C.C.R. 15499, 16013-14 (1996).

Centennial disputes the Board's decision, arguing (1) given the purely geographic understanding of "local" under federal and Puerto Rico law, the Board erred in taking into account Centennial's role in the interconnection when classifying A-B-A calls as nonlocal (Docket No. 32 at 8-13); and (2) under a recent FCC ruling, even long-distance calls must fall under reciprocal compensation arrangements (Docket No. 54 at 3-8). We examine each argument in turn.

Federal law supports the distinction drawn by the Board between A-B calls and others. In 1996, the FCC explored the difference between calls that require reciprocal compensation and those that still may fall under an access-charge regime. See Local Competition Order, 11 F.C.C.R. at 16013-14. For those that require reciprocal compensation, the FCC contemplated only the scenario in which the originating and terminating carriers are different. See id. Moreover, the FCC noted state commissions' "authority to determine what geographic areas should be considered 'local areas' for the purpose of applying reciprocal compensation obligations," and to determine "whether intrastate access charges should apply to the portions of [LECs'] local service areas that are different." Id.

These provisions justify the Board's refusal to extend the reciprocal-compensation scheme it formulated for A-B calls.

As to Centennial's argument that reciprocal compensation should apply regardless of whether the calls are considered local or long distance, given new FCC precedent, we again find the distinction between A-B calls and others to be warranted.[8] See In re High-Cost Universal Serv. Support, 24 F.C.C.R. 6475, 6479-83 (2008). While the FCC did broaden the application of reciprocal compensation to long-distance calls, it maintained the distinction between A-B calls and others. See id. at 6481-82 (considering whether long-distance traffic at issue was terminated by carrier seeking reciprocal compensation). Thus, the Board did not err even under the new FCC ruling in refusing to apply reciprocal compensation to A-B-A calls.

Centennial argues that, regardless of federal law, Puerto Rico law compels the Board to label these calls as local, again relying on the argument that "local" is an entirely geographic label. (Docket No. 32 at 7 (discussing 27 L.P.R.A. § 265a(cc), which defines "local telecommunications service" as "telecommunications service rendered within a local area").) The Board rejected this argument in its Order

[8] The Board argues that Centennial is precluded from arguing the effect of the new FCC precedent, as Centennial failed to raise it either during the administrative proceedings or in its earlier briefs in the instant case. (Docket No. 63 at 8-9.) As to the scope of our review vis-à-vis arguments raised during the administrative proceedings, we again reject the Board's argument. See supra note 6. Likewise, Centennial's failure to raise this argument earlier in this case cannot bar our consideration of FCC rulings relevant to this issue.

on Reconsideration, finding that the Puerto Rico legislature did not have this particular question in mind when it wrote the definition of local traffic. Thus, it found said definition no impediment to its decision, guided by federal law, to treat A-B calls specially. We find the Board's decision under Puerto Rico law reasonable and, thus, decline to disrupt it on that ground.

4. Restriction on Types of Traffic Allowed

This issue concerns whether the Board erred in rejecting Centennial's proposal that the 2008 Agreements explicitly allow PRTC and Centennial to exchange "all lawful traffic" under their interconnection arrangements instead of enumerating particular types of traffic allowed. We derive the following summary from the parties' submissions on this issue. (See Docket Nos. 1 at 16-18; 28 at 13-15, 23-15; 32 at 13-20; 36 at 11-14; 37 at 16-20; 40 at 17-31; 54 at 9-12; Joint Exs. 39 at 9-16; 49 at 5-7.)

Centennial and PRTC's agreements specifically enumerate the types of traffic that they are allowed to exchange at their meet points, the physical points at which they interconnect pursuant to 47 U.S.C. § 251 to exchange traffic. Any type of traffic not enumerated is prohibited. Centennial proposed that the agreements be changed to allow the exchange of "all lawful traffic" at the Centennial-PRTC meet points, without restriction as to types. Centennial reasoned that federal law and policy required, or at least permitted, carriers to use the meet points for any type of traffic these could support.

The Board found that federal law afforded no absolute right to use § 251 meet points for any service. (Joint Ex. 39 at 14.) The Board explained that while federal law supports the "efficient and expansive use of facilities," "[t]here are constraints on the use of interconnection arrangements" established under § 251. (Id. at 15.) For example, the Board explained, the FCC determined that § 251(c)(2) interconnections could not be used to terminate certain long-distance traffic,[9] see Local Competition Order, 11 F.C.C.R. at 15998-99, but that § 251 interconnections could be used to exchange information services, see 47 C.F.R. § 51.100(b). (Joint Ex. 39 at 13-15; 49 at 7.)

Centennial argues that the Board's determination contravenes federal law, which promotes the maximum use of physical meet points, once established, by LECs. (Docket No. 32 at 13-20.) But we find no error in the Board's application of federal law on this issue. Insofar as the FCC expressly expanded the type of traffic allowed under a § 251 interconnection to include "information services," we find no legal error in the Board's decision to match that expansion without going further. While Centennial cites FCC language

[9] Centennial contends that the Board misapplied this federal rule that long-distance carriers may not obtain interconnection under § 251(c)(2) for the sole purpose of terminating long-distance traffic; Centennial is not a long-distance carrier seeking interconnection but rather an LEC seeking to make maximum use of meet points. (Docket No. 32 at 18 & n.41, 19; see also Docket No. 37 at 18.) As this dispute is collateral to the question before us – whether federal law permits the Board to restrict the type of traffic exchanged under § 251 interconnection arrangements – we need not resolve it here.

encouraging expansive use of physical facilities accessed under § 251(d), see, e.g., In re Review of § 251 Unbundling Obligations of Incumbent LECs, 18 F.C.C.R. 16978, 17072-73, such language is inapposite to interconnection arrangements established under §§ 251(a)(1) and 251(c)(2).

A secondary issue under this heading is whether Centennial and PRTC's list of allowed traffic should include Voice over Internet Protocol ("VoIP") traffic. The parties agree that VoIP traffic does not fall into any of the categories already enumerated, yet Centennial and PRTC are allowed to exchange VoIP traffic. Since the Board decided that Centennial and PRTC must maintain a list of allowed traffic, thereby excluding all other traffic, its decision to allow VoIP traffic without including it on the enumerated list is arbitrary and capricious. Thus, the Board erred in excluding VoIP traffic from the enumerated list, to the extent that VoIP traffic does not already fall under an enumerated category.

5. Voice over Internet Protocol

This issue concerns whether the Board erred in rejecting Centennial's proposal to change the means by which PRTC and Centennial rate the VoIP traffic they exchange. We derive the following summary from the parties' submissions on this issue. (See Docket Nos. 1 at 15-20; 28 at 16-17, 27-29; 32 at 20-25; 36 at 16-18; 37 at 20-23; 40 at 31-42; 54 at 12-14; 64; 65; Joint Exs. 39 at 9-16; 49 at 5-7.)

Centennial and PRTC exchange VoIP traffic, whereby callers use a "high-speed Internet connection, along with specialized equipment and software, to make and receive telephone calls." (Docket No. 32 at 20.) During arbitration, Centennial proposed that the Board clarify an ambiguity arising from the difficulty of identifying the origination point of VoIP traffic. This difficulty frustrates the carriers' attempt to classify VoIP traffic as local or long distance for the purpose of applying appropriate rates. Centennial argued that the point at which the traffic switches to normal telephone traffic should serve as a proxy for origination; Centennial's proposal would render all VoIP traffic local, however, as such switching for Puerto Rico VoIP traffic occurs within Puerto Rico, see supra Part IV.3. Centennial submits that a presumption that VoIP calls are local, rather than long distance, is supported by its having identified enough VoIP-traffic origination points to know that the majority of VoIP calls it transmits originate within Puerto Rico.

The Board rejected Centennial's proposal, opting instead to retain the regime Centennial and PRTC already used for rating VoIP traffic. Under that regime, calls whose origination can be identified are rated based on that origination point;[10] for the remaining, unidentifiable calls, the carriers presume that the call is long

[10] The Board reasoned that the identifiable calls would be the vast majority of VoIP calls, as Centennial had admitted its ability to identify the origination point of many VoIP calls. See, e.g., Joint Ex. 49 at 9.)

distance. The Board maintained the latter presumption, relying on the FCC's estimate that the majority of VoIP calls are long distance.

Centennial challenges the Board's decision, claiming that it amounts to a refusal to arbitrate an intercarrier-compensation scheme for VoIP traffic (Docket Nos. 32 at 23-25; 64) and ignores Centennial's factual showing that VoIP traffic in Puerto Rico is more likely to be local than long distance. We decline to upset the Board's decision on either ground. First, the Board's decision to maintain the existing intercarrier-compensation scheme does not amount to a failure to arbitrate the issue. Second, the Board's treatment of Centennial's factual showing was grounded in a reasonable consideration of the evidence before it. In short, the Board's decision on this issue neither contravenes federal law nor was arbitrary and capricious.

V.

Conclusion

For the reasons stated herein, we hereby **GRANT IN PART** Centennial's motion for summary judgment (Docket No. 30); **VACATE IN PART** the Board's Order and Order on Reconsideration (Joint Exs. 39; 49); and **DENY IN PART** the Board's motion (Docket Nos. 27), as to the Board's exclusion of VoIP traffic from the enumerated list of allowable traffic, see supra Part IV.B.4. As to all other issues, see supra Part IV.B, we **GRANT IN PART** the Board's motion for summary

judgment (Docket No. 27); **DENY** PRTC's motion (Docket No. 25); and **DENY IN PART** Centennial's motion (Docket No. 30).

IT IS SO ORDERED.

San Juan, Puerto Rico, this 25th day of November, 2009.

s/José Antonio Fusté
JOSE ANTONIO FUSTE
Chief U.S. District Judge